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12
13 IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

14 JULIE BABAUTA SANTOS, et. al.,

15
16 Petitioners,

17 -v-

18 FELIX P. CAMACHO, etc., et. al.

19 Respondents.
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FILED

DISTRICT COURT OF GUAM

OCT - 3 2005

MARY L.M. MORAN
CLERK OF COURT

CIVIL CASE NO. 04-00006

**OBJECTIONS TO MAGISTRATE
ORDER OF SEPTEMBER 19, 2005
REGARDING THE GOVERNOR'S
MOTION TO DISQUALIFY THE
ATTORNEY GENERAL**

ORIGINAL

1 Pursuant to Fed. R. Civ. Proc. 72(a), the Governor of Guam, Felix P. Camacho (the
2 “Governor”), hereby respectfully files these objections to the Magistrate Judge’s September 19,
3 2005 Order (“Magistrate’s Order”) on the Governor’s Motion to Disqualify the Attorney General.
4

5 INTRODUCTION

6 This is a putative class action concerning the Guam Territorial Income Tax (“GTIT”) and
7 earned income tax credit (“EIC”). Until November 2004, the Attorney General represented the
8 Governor and the Directors of the Department of Revenue & Taxation and Administration (the
9 “Directors”) in this case. That representation ended with the Governor’s and Directors’
10 appearance through independent counsel after the Attorney General advised them that continuing
11 with the previous \$60 million settlement of this case that he had negotiated exposed them to
12 criminal misdemeanor liability, then refused to follow the Governor’s instruction that he take no
13 further actions in support of the settlement. Since then, the Attorney General not only has
14 continued to appear adverse to his former clients, he has subpoenaed them, cross-examined them
15 as hostile witnesses, and sought to defeat (in this action and a related action) his former clients’
16 efforts to enter into a new settlement of this action.
17

18 Despite the existence of facts that would require the disqualification of an attorney in any
19 other case, in denying the Governor’s disqualification motion, the Magistrate Judge erroneously
20 ruled the Attorney General should not be disqualified because he could continue to represent the
21 “public interest” and because the rules of professional conduct should not be “mechanical[ly]”
22 applied to attorney generals.
23

24 However, the Attorney General’s status in this case is not as a representative of some
25 nebulous “public interest” that he may define at will, but is rather as counsel for the government
26 of Guam, a specific legal entity with specific legal interest. As has already been established in the
27 Orders of February 9, March 2, and August 12, 2005 in this proceeding, the Governor under the
28

1 Organic Act of Guam (including 48 U.S.C. § 1421i(d)(2)) sets the government's GTIT policy. In
2 appearing on behalf of the "government," the policy that the Attorney General must represent is
3 the Governor's.

4 Moreover, even if this was a situation where there was a separate "public policy" interest,
5 the Attorney General made a binding election once he chose to appear in this action as counsel for
6 the Governor or Directors. It is not a "mechanical application" of the Rules of Professional
7 Conduct to disqualify the Attorney General from appearing adverse to the Governor and Directors
8 in an action once he already has represented them and has been privy to their confidential
9 information. It is, rather, the absolute minimum necessary to ensure the integrity of the attorney-
10 client relationship.
11

12 **FACTUAL BACKGROUND**

13 **A. The Attorney General's Prior Representation of the Governor and Directors** 14 **in this Matter**

15 When this putative class action concerning the GTIT was first filed, the Attorney General
16 appeared as counsel for the Governor and Directors of the Department of Revenue & Taxation
17 and Administration (the "Directors"). (February 9, 2005 Order at 4.) In June 2004, a proposed
18 settlement of this case was negotiated over a weekend while the Governor was off-island by the
19 Attorney General and Acting Governor Moylan. (Decl. of Rodney J. Jacob, submitted
20 concurrently herewith ("Jacob Decl."), at Exh. 1).
21

22 On October 13, 2004, in response to an inquiry from the Governor, the Attorney General
23 advised the Governor and Directors that implementation of the settlement violated Guam's Illegal
24 Expenditures Act, 5 G.C.A. § 22401. (Jacob Decl. Exh. 2). That Act makes it a criminal
25 misdemeanor to continue with the implementation of a contract with knowledge that the contract
26 violates the Act. *See* 5 G.C.A. § 22401.
27
28

1 In response, the Governor instructed the Attorney General—his counsel of record—to
2 take no actions in furtherance of the settlement until the legality issues was resolved. (Jacob
3 Decl. Exh. 3). As have been previously found, “disregard[ing] the Governor’s wishes,” the
4 Attorney General nonetheless filed a further pleading regarding implementation of the settlement
5 on November 8, 2004. (February 9, 2005 Order at 3). In that pleading, the Attorney General did
6 not disclose to the Court that the Governor, the Attorney General’s client, was concerned (based
7 in part upon the Attorney General’s own advice) that continued implementation of the settlement
8 was in violation of a criminal misdemeanor statute. (Jacob Decl. Exh. 5). Instead, the Attorney
9 General wrote only that the Governor was having “second thoughts.” (*Id.*)

11 **B. After the Governor and Directors Procured New Counsel, the Attorney**
12 **General Unsuccessfully Moved to Strike Their Appearances and Subpoenaed**
13 **and Cross-Examined His Former Clients**

14 In response to the Attorney General’s filing, the Governor and Directors filed appearances
15 through new counsel and stated their objections to the settlement. (February 9, 2005 Order at 3).
16 The Attorney General moved to strike these appearances. (*Id.*)

17 After a hearing was set on the motion to strike, the Attorney General subpoenaed his
18 former clients, the Governor and Directors. (Jacob Decl. Exh. 6). Over vigorous objections, the
19 Attorney General proceeded to cross-examine both Directors with regard to their prior
20 representation by the Attorney General. (Jacob Decl. Exh. 7).

21 One of the two assistant Attorney Generals who conducted the cross-examination of the
22 Directors was Stephen Cohen, Esq. (*Id.*) Mr. Cohen had previously personally represented the
23 Governor’s office and Directors in this case. (*E.g.* Jacob Decl. Exh. 4). During the course of the
24 cross-examination, the Court found that the assistant Attorney Generals were treating their former
25 clients as “hostile” witnesses. (Jacob Decl. Exh. 7 at 36-37).
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1 On February 9, 2005, the Court denied the motion to strike and upheld the right of the
2 Governor and Directors to independent counsel. (February 9, 2005 Order). It held that the
3 Governor was charged with control over the administration and execution of the GTIT and had
4 the right to independent counsel. (*Id.*)

5
6 On March 2, 2005, the Court denied a motion to reconsider the February 9, 2005 Order.
7 (March 2, 2005 Order). On August 12, 2005, Chief District Court Judge Marshall of the Central
8 District of California, sitting by designation in Guam, denied the Attorney General's challenge to
9 the February 9, 2005 Order and March 2, 2005 Order. (August 12, 2005 Order).

10 **C. The Governor's Motion to Disqualify the Attorney General, and the Attorney**
11 **General's Continued Adverse Actions in this and Related Matters**

12 In February 2005, the Governor moved to disqualify the Attorney General from this
13 action. While that motion was pending, in May 2005, the Governor and Directors reached a
14 binding term sheet to settle this action to which the Attorney General refused to agree. (Jacob
15 Decl. Exh. 10).

16 Meanwhile, proceedings were continuing in a later-filed putative class action also
17 concerning the EIC, the *Simpao* action.¹ As was found by the *Simpao* Court, the Attorney
18 General failed in *Simpao* to inform the Court of the term sheet upon the Governor's request.
19 (Jacob Decl. Exh. 13 at 3). Instead, the Attorney General sought to concede issues in a partial
20 summary judgment motion contrary to previous communications with the Governor's counsel.
21 (*Id.*) On September 12, 2005, the Governor was granted intervention in *Simpao* to protect his
22 interests in that case. (*Id.* at 8).

23
24 Earlier, on June 20, 2005, the Governor and Directors had reached a new settlement of
25 this action which the Attorney General has refused to execute. (Jacob Decl. Exh. 11).

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¹ *Simpao, et al. v. Govt. of Guam*, Guam District Court Civil Case No. 04-00049.

1 Subsequently, in *Simpao*, the Attorney General attempted to concede the issue of class
2 certification, notwithstanding an earlier motion for class certification in this proceeding that is
3 part of the settlement of this proceeding. (Jacob Decl. Exh. 12). In *Simpao*, the Court has found
4 that certification of the class that the Attorney General sought to concede would likely cause
5 “interference and a possible collapse of the settlement” in this action. (Jacob Decl. Exh. 13 at 7).
6

7 On September 19, 2005 in this action, the Magistrate Judge issued his Order denying the
8 motion to disqualify, to which the Governor now objects.

9 **ARGUMENT**

10 **I. THE ATTORNEY GENERAL’S DISQUALIFICATION IS REQUIRED BY THE** 11 **RULES OF PROFESSIONAL CONDUCT**

12 The Guam Rules of Professional Conduct (“GRPC”)² prohibit an attorney from
13 representing a client where that representation will be directly adverse to another client or former
14 client “in the same or substantially related matter.” GRPC 1.7, 1.9. The Rules apply to the
15 Attorney General by their express terms. Rule 1.11(d)(1) states that “a lawyer serving as a public
16 officer or employer: (1) is subject to Rules 1.7 and 1.9.” Comment 1 to Rule 1.11 emphasizes
17 that a lawyer “currently serving as a public officer or employee is personally subject to the Rules
18 of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in
19 Rule 1.7.” Indeed, the District Court of Guam has held that the Rules of Professional Conduct
20 apply to the Attorney of Guam, including in his representation of the Governor and other
21 government entities. (See Jacob Decl. Exhs. 8 & 9).
22

23 Rules 1.7 and 1.9 require the Attorney General’s disqualification from this case. The
24 Attorney General seeks to pursue interests adverse to the Governor and Directors, clients he
25 represented mere months ago in this *same* case, without any waivers. These are clients that the
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27
28 ² These Rules follow the ABA Model Rules.

1 Attorney General chose to represent—until his client requested he take no further actions to avoid
2 possible violation of a criminal misdemeanor statute (based upon the Attorney General’s own
3 legal advice memorandum that identified that risk). Now it is uncontested that he is appearing
4 directly adverse to them.

5
6 Courts have held an attorney general cannot appear adverse to a governor on lesser facts.
7 For example, in *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150 (1981), the Attorney General
8 acted as attorney for the Governor and State Personnel Board when a suit was first brought
9 against them concerning a personnel law, outlining various strategic responses. *Id.* at 154.
10 However, soon thereafter, the Attorney General switched sides and instead filed a similar suit
11 against the Governor. *Id.* The court stated: “The issue then becomes whether the Attorney
12 General may represent clients one day, give them legal advice with regard to pending litigation,
13 withdraw, and then sue the same clients the next day on a purported cause of action arising out of
14 the identical controversy.” *Id.* at 155.

15
16 The court held this could not occur: “We can find no constitutional, statutory, or ethical
17 authority for such conduct by the Attorney General.” *Id.* Such conduct, the Court held, was
18 contrary to the ethical duties of the Attorney General, notwithstanding his duties to the “public
19 interest.” *Id.* at 155-57. The court found that the governor of California’s executive power vested
20 in him the power “to determine the public interest.” *Deukmejian*, 29 Cal. 3d at 157-158. Thus,
21 the attorney general could not serve the public interest without abiding by the governor’s
22 determination of the public interest. *Id.*

23
24 Similarly, here, under 48 U.S.C. § 1421i(d)(2) the Governor has “the ultimate and
25 exclusive authority” to determine the public interest with respect to tax policy. (February 9, 2005
26 Order at 4; *see id.* at 6 (“the ultimate and exclusive authority to administer and enforce tax laws”
27 resides solely with the Governor, who has “the same administrative and enforcement powers with
28

1 regard to the [GTIT] as the Secretary of Treasury and other United States officials of the
2 executive branch”) (citing 48 U.S.C. § 1421i(d)(2)). It is “the Governor, and not the Government
3 of Guam or the Attorney General, [who] is mandated to administer and enforce the [tax] laws.”
4 (*Id.* at 7-8.)

5 6 **II. THE MAGISTRATE JUDGE’S ORDER IS CLEARLY ERRONEOUS AND CONTRARY TO LAW**

7 The Magistrate’s Order does not contest the existence of a conflict between the positions
8 of the Governor and Attorney General in this litigation. However, holding that the Attorney
9 General’s “paramount duty is to represent the public interest,” the Magistrate Judge held that the
10 Attorney General accordingly could not be disqualified because the rules of professional conduct
11 could not be “mechanical[ly]” applied and because he had to give meaning to the designation of
12 the Attorney General as “chief legal officer” of the government of Guam. (Magistrate’s Order at
13 4-5). In so ruling, the Magistrate Judge relied on two assumptions that are clearly erroneous and
14 contrary to law.
15

16 **First**, the Attorney General’s ability to represent the “public” or state interest is
17 coterminous with his ability to represent the Governor’s interest and position on issues of Guam
18 taxes. The Organic Act of Guam states, in relevant part:
19

20 The Governor or his delegate shall have the same administrative and enforcement
21 powers and remedies with regard to the Guam Territorial income tax as the
22 Secretary of the Treasury, and other United States officials of the executive
branch, have with respect to the United States income tax.

23 48 U.S.C. § 1421i(d)(2). Thus, as the District Court has already held, the Attorney General is
24 without any independent “authority to override the Governor’s decisions which relate to the
25 Guam Territorial Income Tax (“GTIT”) laws.” (August 12, 2005 Order at 4-5 (quoting February
26 9, 2004 Order at 6)). He cannot pursue a position with the “public interest in mind *as he*
27 *perceives it.*” *Deukmejian*, 29 Cal. 3d at 159 (emphasis added). To hold otherwise would be to
28

1 allow the Attorney General to “supplant his decision for that of the Governor.” (March 2, 2005
2 Order at 4). *See Chun v. Board of Trustees of Employees' Retirement System of State of Hawaii*,
3 952 P.2d 1215, 1234 (Haw. 1998) (“we do not accept the Attorney General’s contention that,
4 merely because she regards her duty to represent the ‘state’s’ legal interests as being paramount to
5 her duty to represent her statutory client’s legal interests, she may, in her sole discretion, so
6 control the course of litigation as to advance her view of the ‘public welfare’ when it squarely
7 conflicts with the substantive position taken by the policy-making state governmental
8 instrumentality whom she represents as a named party to the litigation.”).

10 With due respect, the Magistrate’s Order denying disqualification fails to distinguish
11 between the different categories of “public” interest in which the “government” of a State or
12 Territory may appear. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02
13 (1982) (distinguishing various types of capacities in which States may appear in litigation). This
14 is not a case involving a generalized “public” interest in which the Attorney General is appearing
15 to protect rights collectively held by citizens of a state. *See id.* at 607 (discussing such cases). In
16 appearing on behalf of the “Government,” the Attorney General is appearing on behalf of a very
17 distinct legal entity and interest. The entity is the government of Guam. The interest is the
18 government’s defense of a suit concerning the GTIT, which under 48 U.S.C. § 1421i(d)(2) can
19 only be defined by the Governor. *Cf. Graddick v. Newman*, 453 U.S. 928, 934 (1981) (Alabama’s
20 attorney general could not seek a stay of a court order releasing prisoners where he did not show
21 he had standing in light of a state statute vesting authority over the prison system in the Alabama
22 Governor where that governor opposed that stay) (Powell, J.).³

27 ³ Although this originally was a one-justice order by Justice Powell denying a motion to stay, the Supreme
28 Court as a whole later affirmed this result. There was a dissent by Justice Rehnquist, but it was as to whether
Alabama’s attorney general had clear standing to seek a stay with regard to the prison system. Nothing in Justice

1 Second, even if the Attorney General had some applicable “public interest” power in this
2 case, that would not cure the conflict of interest prohibiting his appearance in this case. The
3 Magistrate’s Order relied upon the notion that rules of professional conduct cannot be
4 “mechanically” applied to an attorney general. But there is a difference between mechanical
5 application and no application at all. *Chun*, 952 P.2d 1215, 1236-37 (“We are aware that this
6 court has recognized that, ‘due to the [Attorney General’s] statutorily mandated role[s] in our
7 legal system, we cannot mechanically apply the [Hawai’i] Code of Professional Responsibility [

9 (HCPR)] to the [Attorney General’s] office We have never held, however, that the Attorney
10 General is relieved of all obligations to conform her conduct to the HRPC, which are applicable
11 to all lawyers licensed to practice in the courts of this state.”) (brackets in original; citations and
12 intervening paragraphs omitted); *Attorney Gen. v. Mich. Pub. Serv. Comm’n*, 625 N.W. 2d 16, 27
13 (Mich. 2000) (“we begin by acknowledging the unique status of the Attorney General as a
14 constitutional officer of the state of Michigan and her concomitant statutory authority to represent
15 the state as its chief legal counsel. However, in this capacity, the Attorney General is not immune
16 from application of the rules of professional conduct.”); see *Deukmejian*, 29 Cal. 3d at 157 (
17 “nothing . . . justif[ies] relaxation of the prevailing rules governing an attorney’s right to assume a
18 position adverse to his clients or former clients, particularly in litigation that arose during the
19 period of the attorney-client relationship”).

21
22 Yet, the implication of the Magistrate’s Order is to completely remove the Attorney
23 General from Rules 1.7 and 1.9: The Attorney General is wholly exempted from disqualification
24 where he takes a position contrary to his former client in related (or here, the same) litigation.
25 This is not a case where, at the outset, an attorney general chose to represent the “public interest”
26 and never attempt to represent the government officials or to become privy to their confidences.
27

28 Rehnquist’s dissent undermined the premise that if the Alabama attorney general lacked standing, then he could not

1 Nor is it a case where an attorney general is neutral, and simply is (through separately screened
2 assistant attorney generals) providing legal services to two parts of a state government that are in
3 disagreement.⁴ This is a case where the Attorney General directly represented and counseled the
4 Governor's office and Directors in an attorney-client relationship, and has since the termination
5 of that representation appeared directly adverse to his former clients and sought to use
6 information from that former representation against them.
7

8 Since his former clients' appearance through independent counsel, the Attorney General
9 has subpoenaed his former clients, conducted an extremely hostile cross-examination with regard
10 to his former representation, and taken actions in the related proceeding of *Simpao* to defeat his
11 clients' rights to settle this case. See GRPC 1.9 (lawyer may not utilize confidential information
12 against client in related or same proceeding); 1.2(a) (lawyer must abide by client's decision
13 regarding settlement); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 467 (2003) ("The spectacle
14 of an attorney skewering her own client on the witness stand . . . demeans the integrity of the
15 legal profession and undermines confidence in the attorney-client relationship"); *Felix v. Balkin*,
16 49 F. Supp. 2d 260, 271 (S.D.N.Y. 1999) (same). Even if the rules of professional conduct are
17 not mechanically applied, if this is not a case in which an attorney general has a disqualifying
18 conflict, then it becomes difficult to hypothesize any case where they will be subject to the ethical
19 limitations imposed by those rules.
20
21

22 And, although the Attorney General may not recognize it, his office would benefit as
23 much from the correct application of the ethical rules as would the Governor and the other
24 members of the Executive Branch who look to the Attorney General for counsel. So long as it
25
26 seek a stay. Instead, that was the basic premises that both justices accepted.

27 ⁴ These are only examples provided to illustrate more difficult potential scenarios. Whether either of the
28 scenarios is lawful in Guam is not a question presented by these proceedings. It may be that Guam's laws and ethical

1 remains a possibility that, halfway through a representation, the Attorney General may decide he
2 has a "public policy" disagreement and needs to appear adverse to his clients, those clients will
3 never be able to freely communicate with the Attorney General. They will never know if
4 something they tell the Attorney General in confidence one day might not be used to skewer them
5 under cross-examination by the Attorney General the next. There would be no sanctity to the
6 attorney-client relationship, and therefore the Attorney General's "clients," in all likelihood, will
7 not be able to feel safe in informing the Attorney General of information he needs to know to
8 carry out his duties.⁵

10 Lastly, the need for the Attorney General's disqualification is particularly great in light of
11 the proposed June 20, 2005 settlement here. If left unchecked, the Attorney General will continue
12 to obstruct the settlement (as he has already tried). The prejudice to the Governor and to his right
13 to set tax policy is extreme and acute; he respectfully asks that the Court set-aside or modify the
14 Magistrate Judge's Order for these and all other grounds stated herein.

16 DATED this 3rd day of October, 2005.

17 OFFICE OF THE GOVERNOR OF GUAM
18 CALVO & CLARK, LLP
19 Attorneys for Defendant Felix P. Camacho,
Governor of Guam

20 By: 
21 RODNEY J. JACOB

23 rules, and the practicalities caused by the small size of its Attorney General's office, make either or both scenarios
24 improper here as well.

25 ⁵ The Governor further respectfully objects to the Magistrate Judge's characterization of him having
26 "switched sides" by opposing the earlier June 2004 settlement. (Magistrate Order at 3). The Governor opposed the
27 settlement after the Attorney General's office stated it was illegal and that continued implementation could be a
28 criminal misdemeanor. The Attorney General, who owed the Governor a duty of loyalty, should have faithfully
represented the Governor's position not to engage in potentially criminal activity. See GRCP 1.2(a) (client defines
objectives of representation and lawyer shall abide by client's decision on settlement). Indeed, in the February 9,
2005 Order, the Court had previously found the Attorney General's actions had "sparked" the Governor's appearance
through independent counsel. (February 9, 2005 Order at 3).